19 (3)

No. 08-648

Supreme Court, U.S.
FILED
FEB 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANICE BREWER, IN HER OFFICIAL CAPACITY
AS ARIZONA SECRETARY OF STATE,
Petitioner,

v.

RALPH NADER AND DONALD N. DAIEN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

ROBERT G. BERNHOFT
Counsel of Record
ROBERT E. BARNES
Of Counsel
THE BERNHOFT LAW FIRM, S.C.
207 E. BUFFALO STREET, SUITE 600
MILWAUKEE, WISCONSIN 53202
(414) 276-3333 TELEPHONE

Counsel for Respondents

February 5, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether this Court should grant review to allow Arizona to use residency as a proxy for fraud by banning all non-Arizonan Americans from engaging in the core political speech of circulating Presidential nomination petitions in a national election for the Presidency?

2. Whether this Court should grant review to allow Arizona to impose a pre-primary ballot deadline for a general election candidate, a deadline currently 153 days in advance of the general election, before the party candidates are even determined, where Arizona cannot even provide an "internally consistent" explanation for the unique and a-historical deadline imposed on independent candidates?

LIST OF PARTIES

On January 21, 2009, Janice Brewer ("Brewer") was inaugurated as the Governor of the state of Arizona. Ken Bennett has succeeded Brewer as Arizona's Secretary of State.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

ARGUMENT 1

I. THE PARTIES AND RIGHTS INVOLVED ... 1

II. STATUTORY FRAMEWORK 2

III. HISTORY OF ELECTION LAWS 9

IV. REASONS FOR DENYING THE PETITION . 12

A. The Ninth Circuit Decision on the Rights of Non-Residents to Circulate Nominating Petitions for the Presidency Conforms to This Court's Precedents, the Overwhelming Trend Amongst Both Circuits and Sister States. 13

B. The Ninth Circuit Decision That The Rights of Voters, Supporters, and Candidates to an Independent-Inclusive Presidential Ballot Made an Early June Deadline Without Even an "Internally Consistent" Excuse from the State Unconstitutional Conforms to This Court's Precedents and the Overwhelming Trend Amongst Appellate Circuits and Sister States. 22

C. There Is No Uncertainty for Amici States Given Overwhelming Concurrence of Circuits and States Against These Laws. . 33

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Amos v. Hadnott,
394 U.S. 358 (1969) 23

Anderson v. Celebrezze,
460 U.S. 780 (1983) ..... *passim*

Anderson v. Hooper,
498 F. Supp. 898 (D.N.M. 1980) 26

Baird v. Davoren,
346 F. Supp. 515 (D. Mass. 1972) 26

Boddi v. McDaniel,
2006 WL 2796413 (N.D. Ill. 2006) 17

Browne v. Bayless,
202 Ariz. 405, 406 P.3d 416 (2002) 31

Buckley v. Valeo,
424 U.S. 1 (1976) 18

Buckley v. Am. Constitutional Law Found. Inc.,
525 U.S. 182 (1999) 13, 14

Burdick v. Takushi,
504 U.S. 428 (1992) 22

Campbell v. Hull,
73 F. Supp. 2d 1081 (D. Ariz. 1999) 4

Chandler v. City of Arvada, Colorado,
292 F.3d 1236 (10th Cir. 2002) 15, 20, 34

Communist Party of Indiana v. Whitcomb,
414 U.S. 441 (1974) 23

Dunn v. Blumstein,
405 U.S. 330 (1972) 19, 30

Fulani v. Lau,
Case No. cv-92-535 (Dist. Ariz. 1992) 24

Frami v. Ponto,
225 F. Supp. 2d 962 (W.D. Wis. 2003) ... 13, 16

Green Party v. Daniels,
445 F. Supp. 2d 1056 (E.D. Ark. 2006) 25

Illinois Bd. of Elections v. Socialist Workers Party,
440 U.S. 173 (1979) 9, 13, 22

In re Initiative Petition No. 379,
155 P.3d 32 (Okla. 2006) 21

Initiative & Referendum Institute v. Jaeger,
241 F.3d 614 (8th Cir. 2001) 14

Krislov v. Rednour,
226 F.3d 851 (7th Cir. 2000) .. 13, 14, 15, 16, 18

KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens,
13 P.3d 772 (Ariz. App. 2000) 17

Lawrence v. Jones,
18 P.3d 1245 (Ariz. App. 2001) 15, 17

Lerman v. Bd. of Elections in the City of New York,
232 F.3d 135 (2nd Cir. 2000) 14, 15

Leydon v. Town of Greenwich,
777 A.2d 552 (Conn. 2001) 17

McCarthy v. Briscoe,
429 U.S. 1317 (1976) 22

McCarthy v. Hardy,
420 F. Supp. 410 (E.D. La. 1976) 24

McCarthy v. Kirkpatrick,
420 F. Supp. 366 (W.D. Mo. 1976) 24

McCarthy v. Noel,
420 F. Supp. 799 (D.R.I. 1976) 24

Meyer v. Grant,
486 U.S. 414 (1988) 13, 14

Moore v. Ogilvie,
394 U.S. 814 (1969) 23

Morrill v. Weaver,
224 F. Supp. 882 (E.D. Penn 2002) 15

Nader 2000 Primary Comm., Inc. v. Hazeltine,
110 F. Supp. 2d 1201 (D.S.D. 2000) 24

Nader 2000 Primary Comm., Inc. v. Hechler,
112 F. Supp. 2d 575 (S.D.W. Va. 2000) 15

Nader v. Blackwell,
545 F.3d 459 (6th Cir. 2008) 1, 14, 34

Nader v. Brewer,
531 F.3d 1028 (9th Cir. 2008) ..... *passim*

Norman v. Reed,
502 U.S. 279 (1992) 22

Perez-Guzman v. Gracia,
346 F.3d 229 (1st Cir. 2003) 14, 19

Rockefeller v. Powers,
917 F. Supp. 155 (E.D.N.Y. 1996) 30

Salera v. Tucker,
399 F. Supp. 1258 (E.D. Penn. 1975), *aff'd*, 424 U.S. 959 (1976) 22

Silverman v. Berkson,
661 A.2d 1266 (N.J. 1995) 20

Socialist Workers Party v. Rockefeller,
314 F. Supp. 984 (S.D. NY 1970), *aff'd*, 400 U.S. 806 23

Village of Schaumburg v. Citizens for a Better Env't,
444 U.S. 620 (1980) 20

Warren v. Fairfax County,
196 F.3d 186 (4th Cir. 1999) 17

Washington Initiatives Now v. Rippie,
213 F.3d 1132 (9th Cir. 2000) 21

Whig Party of Alabama v. Siegelman,
500 F. Supp. 1195 (N.D. Ala. 1980) 26

Williams v. Rhodes,
393 U.S. 23 (1968) 23, 28

Yes On Term Limits, Inc. v. Savage,
550 F.3d 1023 (10th Cir. 2008) 1, 14, 33

STATUTES

Ariz. Rev. Stat. § 16-101 2

Ariz. Rev. Stat. § 16-184 8

Ariz. Rev. Stat. § 16-242 ..... 3, 4, 5, 8

Ariz. Rev. Stat. § 16-311 ..... 2, 3, 5

Ariz. Rev. Stat. § 16-314 ..... 6, 8

Ariz. Rev. Stat. § 16-315 2

Ariz. Rev. Stat. § 16-321 ..... 2, 8

Ariz. Rev. Stat. § 16-322 ..... 3, 4, 5

Ariz. Rev. Stat. § 16-322(B) 5

Ariz. Rev. Stat. § 16-322(c) 5

Ariz. Rev. Stat. § 16-341 ..... 2, 3, 4, 5, 6, 8

Ariz. Rev. Stat. § 16-351 8

Ariz. Rev. Stat. § 16-801 ..... 3, 4, 5

Ariz. Rev. Stat. § 16-804 4

Ariz. Rev. Stat. § 16-1004 8

Ariz. Rev. Stat. § 16-1010 8

Ariz. Rev. Stat. § 16-1020 8

1891 Ariz. Territory Sess. Laws, ch. 64 6

1909 Ariz. Territory Sess. Laws, ch. 64 6

1993 Ariz. Sess. Laws, ch. 98 4

1999 Ariz. Sess. Laws, ch. 224 6

OTHER AUTHORITIES

82 Ops. Cal. Atty. Gen. 250 (Dec. 22, 1999) 15

1999 Nev. Op. Atty. Gen. No. 37 (Dec. 1, 1999) .. 15

A. Ludington, *American Ballot Laws, 1888-1910* (1911) 9

A. Ranney & W. Kendall, *Democracy & the American Party System*, W. Pol. Q., Vol. 9, No. 4 (Dec. 1956) 10

Behavior Research Center of Arizona, *Rocky Mountain Poll*, Released in May of 2004 . 26, 27

Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory & The Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002) 11

Charles Lincoln Van Doren and Robert McHenry, *Webster's Guide to American History* (1971) . 27

Daniel A. Mazmanian, *Third Parties in Presidential Elections*, W. Pol. Q., Vol. 27, No. 4 (Dec. 1974) 10

Fed. Election Comm., *2008 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access*, (Aug. 14, 2008), *available at* http://www.fec.gov/pubrec/2008pdates.pdf. .. 33

G. Sartori, *Parties and Party Systems* (Cambridge Univ. Press 1976) 10

Hedrick Smith, *President and Regan Now Appear Likely Contenders in Fall Elections*, New York Times (March 20, 1980) 29

James Reichley, "The Future of the Two-Party System After 1996", in *The State of the Parties* (John C. Green & Daniel M. Shea, eds., 3rd ed. 1999) 10

John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933) 9, 10

Patricia O'Toole, *The War of 1912*, Time, June 25, 2006 27

Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (Nov. 1999) . 10

Richard Winger, "History of U.S. Ballot Access Law for New and Minor Parties," *The Encyclopedia of Third Parties in America*, Vol. 1 (2000) 9

Richard Winger, *How Many Parties Ought To Be On the Ballot?: An Analysis of Nader v. Keith*, 5 Election L.J. 170 (2006) 7, 8, 24, 25

Robert B. Mitchell, *Egad! He Moved His Feet When He Ran: James Weaver, the First to 'Run' in a Presidential Race*, Washington Post, July 5, 2008 27

Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 Harv. J.L & Pub. Policy 91 (2000) 11

State of Arizona Official Canvas 2002 Elections .. 5

Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America*, (Princeton Univ. Press 1984) 10

Steven Rosenstone, *Restricting the Marketplace of Ideas: Third Parties, Media Candidates & Forbes' Imprecise Standards*, 18 St. Louis U. Pub. L. Rev. 485 (1999) 11

The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau, *A Model Act for the Democratization of Ballot Access*, 36 Harv. J. on Legislation 451 ..... 11, 12

The Law of Democracy: Legal Structure of the Political Process (Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, eds., Foundation Press, 2nd ed. 2001) 10, 11

W. Goodman, *The Two-Party System in the United States* (Princeton: D. Van Nostrand Co. 1957) . 10

William E. Geinapp, *The Origins of the Republican Party* (1987) 27

ARGUMENT

Arizona and amici mask the isolated nature of their position, disclosed in how few states employ such residency bans on core political speech and restrictive methods of ballot inclusion. In so doing, Arizona and amici inflate a circuit split, ignore the modern trends, and ask the court abandon the Constitutional policies behind its precedents and the near-uniform scholastic opinion. The salutary, scholarly, and succinct opinion of the Ninth Circuit, crafted by the long-respected chief judge herself, precedent-conforming, and scholastically well-received, valuably contributes to the decisional law of this area of Constitutional concern and democratic access, as most evident by the Sixth and Tenth Circuit appellate panels following its logic within months of its issuance. *See Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) and *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). Given the decision's proper application of strict scrutiny where the judicially found facts and trial court record demonstrate a discriminatory and severe burden on First Amendment protected rights, the *de minimis* conflict with the scattering of occasional and usually outdated Circuit or state opinions (decisions marked with dissimilar facts not even addressing modern arguments), this case does neither compel nor recommend the granting of certiorari merely to absolve the election laws of the last remaining dissident states.

I. THE PARTIES AND RIGHTS INVOLVED.

Ralph Nader announced his candidacy as an independent candidate for the Presidency. (R. 46, ¶ 37.) Nader resides in the state of Connecticut. (R. 46, #5 Exhibit.) Donald Daien is a registered voter in

the state of Arizona. (R. 46, #6 Exhibit, p. 5.) Daien was a known Nader supporter in Arizona. Brewer is the Secretary of State for the State of Arizona. (R. 46, #1 Exhibit, ¶ 1.) The Secretary is charged with the administration and enforcement of the state's election laws. (R. 32, Answer, ¶ 10.) The rights at issue center on the First Amendment rights to assemble and speech.

II. STATUTORY FRAMEWORK.

It does not matter how many voters want to include the option of an independent on the ballot in Arizona; rather, it only matters that 3% of all independent registered voters in the state sign a nominating petition circulated by a resident of Arizona and that said petition be submitted at least 153 days before the general election. Voters cannot sign nomination petitions except in the presence of a circulator; voters cannot include an independent on the Arizona residential ballot but by nominating petition. Ariz. Rev. Stat. §§ 16-311, 16-341. Circulators must be qualified to vote in Arizona at the time they circulate the petition. Ariz. Rev. Stat. §§ 16-315, 16-321. To be qualified to vote, the circulator must be an Arizona resident 29 days before the election. Ariz. Rev. Stat. § 16-101. Even if every Arizona voter in the state signed the petition, the state cannot accept a petition circulated by a non-resident. *Id.* Arizona law prohibited Nader himself from circulating petitions on behalf of his own candidacy. *Id.* Arizona law prohibited more than 200,000,000 Americans from circulating petitions in a national election in which they each had a stake.

An independent candidate for President must submit nomination papers to be placed on the ballot. Ariz. Rev. Stat. §§ 16-311, 16-341. This is not the case for partisan Presidential candidates, who do not have to submit any such nomination petitions for the partisan presidential preference primaries. Ariz. Rev. Stat. § 16-242. The nomination petition for Independent presidential candidates must be signed by at least 3% of qualified electors who are not registered as members of a recognized political party. Ariz. Rev. Stat. §§ 16-311, 16-341. This equaled 14,694 verified signatures on public nominating petitions by then-registered voters, the highest signature requirement in the state for elective office, and continues to rise with the rise of the number of nonpartisan registered voters in Arizona. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. The petitioning deadline for nominating Independent candidates for the November general election ballot for President closed on June 9, 2004, the deadline for September primary candidates to submit their petitions. Ariz. Rev. Stat. § 16-311. Notably, primary candidates enjoy a 90-day deadline; independents alone face a 153-day deadline. Ariz. Rev. Stat. §§ 16-311, 16-322, and 16-341.

Voters are not allowed to signal their support for a candidate through media recognition, public opinion surveys, or in any anonymous way (such as confidential postcards or the equivalence of absentee ballots). Instead, voters must sign a public nominating petition in the presence of a circulator and those petitions are available to the public, unlike a person's ballot. In 1993, after Arizona saw two independent candidates for the Presidency make the ballot and win record votes from Arizonans, Arizona party-dominated

legislature imposed one of the earliest deadlines in the nation, moving the deadline from September after the partisan primaries, to early June, and further imposed a party litmus test on signatories (limiting independent candidates to just those Arizona voters who are not registered members of any political party). 1993 Arizona Session Laws, ch. 98. The latter restriction has already been declared unconstitutional by the Arizona district court. *See Campbell v. Hull*, 73 F. Supp. 2d 1081 (D. Ariz. 1999). Even though 150,000 Arizonans, in public surveys by independent public universities in the state, expressed their interest in voting for Nader in 2004, Nader was unable to overcome the limited pool of circulators, the limited audience he could reach with limited circulators, and the early timeline for access to the ballot. Nader was consequently not on the 2004 Arizona ballot, while he was on the ballot in most other states.

Under the state-asserted objective that Arizonans would be too confused to express their choices on the ballot if they had too many choices, Arizona imposes selective signature requirements on those seeking access to the ballot. However, Arizona employs no consistent standards for how many public signatures are needed for the supposed public goal of avoiding voter confusion, deception or frustration from too many choices on an Arizona ballot for statewide office. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. For example, no signatures at all are needed to qualify for the state presidential preference ballot. Ariz. Rev. Stat. § 16-242. For statewide partisan candidates other than the presidential preference primary, the number of signatures required to avoid confusion is set as low as 75 signatures. Ariz. Rev. Stat. §§ 16-322, 16-804. In 2004, a Libertarian candidate for statewide

office needed signatures equaling only one-half of one percent of the party's registration in the state, or 82 signatures, to avoid voter confusion on the ballot. Ariz. Rev. Stat. § 16-322(B); *see also* State of Arizona Registration Report, March 1, 2004. While no party candidate for President needs any signatures, the Republican statewide non-Presidential candidates need only 4603 signatures while a Democratic statewide candidate need only 4037. Ariz. Rev. Stat. § 16-322; *see also* State of Arizona Official Canvas 2002 Elections. For partisan candidates without party registrants, the access to the statewide ballot can be as low as 566 signatures. Ariz. Rev. Stat. § 16-322(c); *see also* State of Arizona Official Canvas 2002 Elections. Indeed, a new party can be formed with fewer signatures than an independent candidate must gather – a mere 8375 signatures in 2004. Ariz. Rev. Stat. § 16-801; *see also* State of Arizona Official Canvas 2002 Elections. By contrast, an independent candidate for the Presidency required 14,694 verified signatures for Arizona voters to include their choice on the ballot. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. This is because independent candidates have the highest percentage requirement of any candidate in the state.

The variance in signature requirements recurs in the variance in deadlines to submit nomination petitions. For partisan presidential candidates in the presidential primary, the deadline is a mere forty days prior to the election. Ariz. Rev. Stat. § 16-242. For other statewide candidates in the primary, the deadline is ninety days prior to the election. Ariz. Rev. Stat. § 16-311. For independent candidates, however, the deadline is one hundred and forty-six days prior to the election – ninety days prior to the primary, which

is usually fifty-one days prior to the general election. Ariz. Rev. Stat. §§ 16-314, 16-341. The practical effect of this provision is to prohibit an independent candidate from emerging after the deadline for partisan candidates to submit their names for the primary ballot or an independent emerging as a result of developments during the primary campaign within the state or during the conventions.

The history of the law governing the deadline for independent Presidential candidates is equally unusual. The original government-printed ballot of 1891 set the deadline at 20 days before the general election. *See* 1891 Arizona Territory Session Laws, ch. 64, p. 83. In 1909, this was changed to ten days after the September primary. *See* 1909 Arizona Territory Session Laws, ch. 64, p. 65. This September deadline remained the law until 1993. Arizona's deadline suddenly jumped from September to June after independent candidates for the Presidency received record votes in the state in the 1992 presidential election. Following the 1992 election, in 1993, Arizona's party-dominated legislature suddenly reversed a hundred years of established practice. 1993 Arizona Session Laws, ch. 98. The new law required independent petitions seeking access to the November general election ballot be submitted on the same day in June on which primary candidates seeking a place on the September primary ballot were required to submit their petitions. *Id.*, § 24, p. 307. A third change in 1999 occurred in Arizona, where the legislature changed the deadline from late June to early June. 1999 Arizona Session Laws, ch. 224, § 1. The 1993 law dramatically moved back the deadline for independents, even though independent candidates

did not participate in the primary and without any logical justification.

Additionally, Arizona's June deadline is not in conformity with the custom of sister states nor with its own history; equally, Arizona's signature requirement for nominating petitions, the lack of alternatives to nominating petitions, and the residency requirement for circulators are also contrary to the custom of most states. The median deadline across the nation has, since the inception of the state controlled ballot, been between August and October. *See* Richard Winger, *How Many Parties Ought To Be On the Ballot?: An Analysis of Nader v. Keith*, 5 Election L.J. 170 (2006). Thirty-six of the fifty states do not impose deadlines until the convention season in August, and thirteen of those states do not impose deadlines until September, as Arizona did for so long until the success of the independent Presidential candidates in 1992. *Id.* at 192. Arizona's signature requirements for independents also steadily increased, and the 14,694 signatures, as a percentage of the national electorate, is one of the highest in the nation. *Id.* at 196. The median number of signatures required has ranged between 0.1% and 0.6% of the number of votes cast in the state, which would equal between 1,000 and 6,000 signatures in Arizona, for an average of 3,500 signatures. *Id.* at 175, Table 2.

> To put the current 635,000-signature requirement to get on the ballot in all states for an independent in perspective, note that a Democrat seeking his or her party's presidential nomination in 2004 could obtain a place on all presidential primary ballots with just 27,000 valid signatures (assuming the candidate is

> someone who is discussed in the news media or who qualifies for federal matching funds). The only mandatory petitions in 2004 Democratic presidential primaries were: Alabama 500 (17-16A-3), Illinois 3,000 (10ILCS5/7-10), Indiana 4,500 (3-8-3-2), New Jersey 1,000 (19:25-3), New York 5,000 (Ch. 17,2-122), Pennsylvania 2,000 (Title 25, sec. 2911), Vermont 1,000 (Title 17, sec. 2702), Virginia 10,000 (24.2-545). For Republicans, the total was 22,000 (New York Republicans could get on automatically, with no petition needed, if they qualified for matching funds, or if they were discussed in the news media).

Id. at 176, n.40.

A host of technical requirements impose further restrictions: circulators must use select forms in precise conformity with extended regulations and laws; a voter's signature is stricken if it does not match the confidential signature on the voter card, the address listed on the voter card, or the voter's precise name; there is no confidentiality as to who signed a nominating petition from their public or political adversaries; and privatized petition lawsuits are only applicable as to *independent* presidential candidates. Ariz. Rev. Stat. §§ 16-242; 16-314; 16-321; 16-341; 16-351. Arizona's county register system allows verification of signatures by comparing the signature and address of the voter on his registration card with the nomination petition. Ariz. Rev. Stat. § 16-351. Arizona criminalizes various election related conduct. Ariz. Rev. Stat. §§ 16-184; 16-1004; 16-1010; 16-1020.

III. HISTORY OF ELECTION LAWS.

State control of the ballot was foreign to the founders of America. *See* Richard Winger, "History of U.S. Ballot Access Law for New and Minor Parties," *The Encyclopedia of Third Parties in America*, Vol. 1 (2000); *see also* A. Ludington, *American Ballot Laws, 1888-1910* (1911). The invention of the state ballot originated in the late nineteenth century. *See id.* Before that, voters and their supporters could bring their own ballot to the voting polls. *See id.* Most states adopted the state ballot and employed free and open ballot access to be as inclusive as many voter options as possible, with few ballot access restrictions, during most of the first half-century of state ballots. *See id.*

This period of open ballot birthed some of the most significant independent political efforts outside the two-party system in our history. *See e.g.*, John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933). The collective efforts of outsider candidacies are widely credited as creating the most significant and beneficial reforms in American political history as the "fertile" bed of new ideas. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *see also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation.")

Outsider options through third-party campaigns or candidacies provide the most effective method of expression by those feeling excluded from the two-

party system, but does so within the system: channeling dissent through democratic means and giving voice to that dissent. This type of dissent led to abolition, direct election of senators, the right of women and draft-eligible citizens to vote, the right to overtime, the limits on child labor, aid to farmers, and expanded participation in the public arena with more confidence in American institutions as representative of them. *See e.g.*, John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933); A. Ranney & W. Kendall, *Democracy & the American Party System*, W. Pol. Q., Vol. 9, No. 4, p. 1015 (Dec. 1956); W. Goodman, *The Two-Party System in the United States*, (Princeton: D. Van Nostrand Co. 1957); Daniel A. Mazmanian, *Third Parties in Presidential Elections*, W. Pol. Q., Vol 27, No. 4, p. 779 (Dec. 1974); G. Sartori, *Parties and Party Systems*, (Cambridge Univ. Press 1976); Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America*, (Princeton Univ. Press 1984).

It was only when third parties and candidates outside the party system began to seriously challenge for power or reshape the debate in ways the political incumbents found threatening that state approaches to the state ballot began to change. *See e.g.*, Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605, 1617 (Nov. 1999) (noting "the history of ballot access restrictions which get elevated just as serious new parties or independent candidates emerge as threats"); James Reichley, "The Future of the Two-Party System After 1996", in *The State of the Parties* (John C. Green & Daniel M. Shea, eds., 3rd ed. 1999) ("The representatives of the two major parties have taken pains to enact election laws that strongly favor major party candidates"); *The Law of Democracy:*

Legal Structure of the Political Process (Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, eds., Foundation Press, 2nd ed. 2001) (noting "the self-interest existing power holders have in manipulating the ground rules of democracy in furtherance of their own partisan, ideological, and personal interests"); Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory & The Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002); Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 Harv. J.L & Pub. Policy 91, 96-97 (2000) (the natural side effect of politicians overseeing the terms and conditions of their competition is to limit that competition through ballot rules).

With the slow, steady closing of the ballot, more and more independent and outside parties disappeared from potential choices for voters, disappeared from the public discourse, and disappeared from the public consciousness. Other scholars note how badly these restrictions limit the marketplace of ideas the First Amendment was intended to promote and protect. *See* Steven Rosenstone, *Restricting the Marketplace of Ideas: Third Parties, Media Candidates & Forbes' Imprecise Standards*, 18 St. Louis U. Pub. L. Rev. 485 (1999). This honorable court concurred in its seminal decision in *Anderson v. Celebrezze*, 460 U.S. at 805.

The public increasingly concurs, as they refuse partisan labels in registration, voting patterns and public opinion, while seeking more options for debate participants in Presidential debates and more options for choices on the ballot. *See* The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau, *A Model Act for the Democratization of Ballot Access*, 36 Harv. J. on Legislation 451, 454

(noting wide spread public desire for third options outside the two-party system in consistent public opinion surveys). The irony in states like Arizona is that the more voters refuse to align with partisan registration, the more difficult it is to include independents on the ballot, as the signature requirements increase proportionally.

IV. REASONS FOR DENYING THE PETITION.

As the overwhelming majority of Circuits and states reject Arizona's residency ban on circulators and co-equally reject Arizona's early June, pre-primary deadline for independent presidential candidates for the general election ballot, and just as the overwhelming trends amongst sister Circuits and lower court decisions agree with both the application of strict scrutiny to comparable laws and factual settings and with the conclusions of the Ninth Circuit, this case does not warrant *certiorari*. Only a small minority of states imposes and only one Circuit approves a residency ban on circulator speech, substituting a person's residency as a proxy for one's propensity to commit criminal fraud. Only a small minority of the states imposes primary-based deadlines on general election independent candidates and even fewer impose deadlines in early June for a November election ballot.

A. The Ninth Circuit Decision on the Rights of Non-Residents to Circulate Nominating Petitions for the Presidency Conforms to This Court's Precedents, the Overwhelming Trend Amongst Both Circuits and Sister States.

Petition circulation is "core political speech" and protecting such speech reaches its "zenith" when someone is circulating a petition. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). This requires "exacting" and "strict" scrutiny for any limitation on that core political speech. *Meyer*, 486 U.S. at 421; *see also Buckley*, 525 U.S. 182. This is because elections are as much a means of disseminating ideas and expressing dissent as they are means of attaining office and political objectives. *See Socialist Workers Party*, 440 U.S. at 186.

In *Buckley*, the Supreme Court found unconstitutional the same logic Arizona employed here: limiting speech rights to the electorate. Since *Buckley* was decided, the federal courts routinely and regularly struck down state law requirements that petition circulators could only circulate petitions to those in the same area where they could vote for federal elections. *See Krislov v. Rednour*, 226 F.3d 851, 858-66 (7th Cir. 2000); *see also Frami v. Ponto*, 225 F. Supp. 2d 962 (W.D. Wis. 2003).

Twelve Circuit judges from four different Circuits examined the same resident-only petition circulator issue and came to a unanimous conclusion: prohibiting all non-residents from circulating petitions violated their First Amendment rights. *See e.g., Nader*

v. Brewer, 531 F.3d 1028 (9th Cir. 2008); *Yes on Term Limits*, 550 F.3d 1023; *Nader v. Blackwell*, 545 F.3d 459; *Krislov v. Rednour*, 226 F.3d 851.

Every Circuit applying strict scrutiny, including the Sixth Circuit, the Seventh Circuit and Tenth Circuit, agrees banning all non-residents from core political speech cannot conform to First Amendment protections. The plain logic of the First and Second Circuit decisions in analogous cases concurs. *See Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135 (2nd Cir. 2000) and *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003). Only one circuit, in a dissimilar case, and from 2001, which did not manifestly apply strict scrutiny, addressed to the limited issue of the in-state ballot initiative, and which did not address the multiple alternative means of the state to prevent fraud without banning all non-resident speech, disagreed. *See Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001). Aside from its dubious failure to apparently apply strict scrutiny, the Eighth Circuit's early decision, deviant from the established trend, expressly relied on two rejected assumptions: first, that the focus should be on the amount of speech included, rather than excluded, *Jaeger*, 241 F.3d at 617 ("[M]any alternative means remain to non-residents who wish to communicate their views."); second, that the state had a "grassroots" interest in excluding outside agitators, *id.* at 616. The first assumption was rejected in *Buckley* when the Court struck down a law that "'imposes a burden on political expression that the State has failed to justify.'" *Buckley*, 525 U.S. at 195 (quoting *Meyer*, 486 U.S. at 428) and the second has been rejected by almost all courts in the country that have considered residency

requirements. *See also Lawrence v. Jones*, 18 P.3d 1245 (Ariz. App. 2001) (ruling that cities cannot limit circulator rights to city voters); 1999 Nev. Op. Atty. Gen. No. 37 (Dec. 1, 1999) (Nevada provisions requiring initiative petition circulators to be registered voters are unenforceable); 82 Ops. Cal. Atty. Gen. 250 (Dec. 22, 1999) (circulators of initiative petitions need not declare they are residents and voters).

A similar logic led multiple courts to strike down circulator restrictions that limited circulators to the local voting pool. *See e.g.*, *Morrill v. Weaver*, 224 F. Supp. 882, 904 (E.D. Penn 2002) (holding Pennsylvania in-district residency requirement unconstitutional); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002); *Lerman*, 232 F.3d at 145-54 (holding unconstitutional New York's requirement that witnesses to ballot access designating petitions be resident of the political subdivision); *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 (S.D.W. Va. 2000) (granting preliminary injunction by finding "*Buckley* strongly suggests the West Virginia statute's resident voter requirement for petition circulators is presumptively unconstitutional.").

The Seventh Circuit Court of Appeals proved seminal. In *Krislov*, the Seventh Circuit found unconstitutional a residency requirement on the same logic applicable here. The court took particular aim at the exclusion of out of state residents, even though that election only involved a state officeholder. The Seventh Circuit concluded:

> [T]hc First and Fourteenth Amendments compel States to allow their candidates to

> associate with non-residents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions.

Krislov, 226 F.3d at 865.

The District Court for the Western District of Wisconsin concurred holding that Wisconsin's petition circulation scheme may not prohibit out of state circulators, even if the electoral office was only a state office. *See Frami v. Ponto*, 225 F. Supp. 2d 962 (W.D. Wis. 2003). Judge Crabb held that the residency requirement was not narrowly tailored to meet any compelling state interest.

> Such laws are harmful to the unity of our Nation because they penalize and discriminate against candidates who wish to associate with and utilize the speech of non-residents. **A desire to fence out non-residents' political speech – and to prevent both residents and non-residents from associating for political purposes across district boundaries – simply cannot be reconciled with the First Amendment's** purpose of ensuring the widest possible dissemination of information diverse and antagonistic sources.

Id. at 969 (citing *Krislov*, 226 F.3d at 866) (internal citations omitted) (emphasis added).

As another district court aptly surmised, the "residence of a petition circulator is unrelated to any state interest. As a consequence, such restrictions can rightly be viewed as a device to exclude to minor-party

or independent candidates." *Boddi v. McDaniel*, 2006 WL 2796413 (N.D. Ill. 2006).

Arizona state courts concurred in a comparable context.

> In considering whether a locality had a compelling interest in preventing involvement in the referendum process by "political outsiders," we pointed out that the "grass roots support" interests are already protected by the requirements that only local residents can actually sign the petition and only local residents can actually vote in a local referendum election . . . . Therefore, we concluded, a local residency requirement imposed on referendum petition circulators would "run afoul of the First and Fourteenth Amendments under the principles set forth in *Buckley*."

Lawrence v. Jones, 18 P.3d 1245, 1253 (Ct. App. Ariz. 2001) (quoting *KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772, 780 (Ariz. App. 2000)).

Treating non-residents as dangerous outsiders has been routinely criticized. *See Warren v. Fairfax County*, 196 F.3d 186, 199 (4th Cir. 1999) (suggesting in *concurrence* nonresidents cannot be excluded from public forum, which would "balkanize" civic dialogue by geography) (Wilkinson, J., *concurring*); *see also Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001) (excluding non-residents from public forum offends First Amendment).

> Allowing citizens of the other forty-nine States to circulate petitions increases the opportunity for the free flow of political ideas. In some cases this might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular. But the First Amendment "was designed to secure the widest possible dissemination of information from diverse and antagonistic sources to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."

Krislov, 266 F.3d at 866 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

Arizona, like the small minority of states who still impose these laws, claims a state can prohibit millions of Americans from entering Arizona and engaging in core political speech. This Court, and every Circuit save one, rejected that precise argument. It is the amount of speech prohibited, not the amount of speech permitted, determines First Amendment burdens. Brewer claims there was "no evidence" that the ban on non-residents circulating petitions imposed "a severe burden (or indeed, *any* burden) on the rights of Nader and his supporters." (Petition, p. 16.) However, most of Nader's nationwide supporters are non-Arizonans and all of those non-Arizonans were prohibited from engaging in core political speech, including Nader himself on behalf of his own candidacy, and certainly when a candidate himself is barred from circulating nomination petitions, that is a severe burden on speech. In addition, any Arizonan who would vote in the presidential election but was not a resident in June, was prohibited from circulating petitions, in

contravention of this Court's established precedent in *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The principal reason advanced by Arizona to justify its residency requirement was the need to subpoena circulators as witnesses. (R. 45, p. 16.) A complete ban on all non-resident circulating petitions – potentially millions of people living outside of Arizona – is not a narrowly tailored means to that interest as evidenced by the following examples of less-intrusive means of regulation.

First, the existing verification methods for voter signatures – through voter registration cards with signatures already on them and, when needed, the testimony of the voter themselves – already protects the state interest in insuring the accuracy of voter signatures. The best evidence, the only reliable evidence, and definitely the only *narrowly-tailored means* to assess competent evidence of valid petition signatures, is the voter registration card with the voter's confidential signature or the testimony of the voters themselves, not the speculation or self-serving testimony of a circulator. This is why so few states even regulate petition circulators in the first place. As the First Circuit held in striking down an attorney-notary requirement for petition circulation, the "in house verification procedure" with authenticating signatures much like Arizona's "compares favorably" to such other restrictions and such restrictions cannot be seen to add "anything over and above other readily available means of verification." *Perez-Guzman*, 346 F.3d at 246.

Second, the state already has the authority to subpoena non-residents for conduct of non-residents

within the state. *See Silverman v. Berkson*, 661 A.2d 1266 (N.J. 1995) (basing its opinion on the doctrine of minimum contacts). The state routinely does this in various material witness cases and non-resident motorist cases, and could equally and easily authorize so here.

Third, the states could easily impose a requirement to agree to service of process as a condition of circulating petitions rather than simply ban all non-residents from circulating presidential petitions. As the Tenth Circuit noted in striking down a similar residency ban:

> The City could achieve its interest without wholly banning nonresidents from circulating petitions in Arvada. As suggested at oral argument, Arvada could require, for example, as a prerequisite to circulating an initiative, referendum, or recall petition in the City, the prospective circulator agree to submit to the jurisdiction of the Arvada Municipal Court for the purpose of subpoena enforcement.

Chandler, 292 F.3d at 1244.

Fourth, the existing laws prohibiting fraud suffice because they directly prevent the fraud, rather than the speech. This conforms precisely to this court's precedents. "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). Furthermore, as the Ninth

Circuit previously noted, such a fear of fraud is remote, as is, given the distance to the actual balloting, which is what really matters. *See Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000).

The amicus curiae brief suggests, by quoting *In re Initiative Petition No. 379*, 155 P.3d 32, 42 (Okla. 2006) that state courts have "no ability to ascertain whether a particular voter actually signed a petition" without a circulator's testimony. (Amicus Brief, p. 13.) This is nonsense. The signatures are and can be checked the way they are checked in every city, county and state election board in the nation – first, by checking the signatures against the voter's signature card; and, second, by the voter's own testimony if necessary. Moreover, the amicus curiae brief concedes any circulator would want to appear in court because "negative inferences" would be "drawn from a circulator's unavailability as a witness." *Id.*, p. 15.

The complete ban on non-residents circulating petitions, including the candidate himself, interferes with substantially more speech than necessary to accomplish the state interest in insuring no "voter confusion" on the ballot from "too many choices", the only pretext for requiring the signatures of voters on petitions are accurate signatures in the first instance.

B. The Ninth Circuit Decision That The Rights of Voters, Supporters, and Candidates to an Independent-Inclusive Presidential Ballot Made an Early June Deadline Without Even an "Internally Consistent" Excuse from the State Unconstitutional Conforms to This Court's Precedents and the Overwhelming Trend Amongst Appellate Circuits and Sister States.

Deadlines must be reasonable, nondiscriminatory, and not severe before any scrutiny less than strict scrutiny applies. *See Anderson*, 460 U.S. 780; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Any burden treating independents as a suspect class for targeting is a severe burden. *Anderson*, 460 U.S. at 792.

This court repeatedly invalidated laws limiting voter choice on the ballot. *See Norman v. Reed*, 502 U.S. 279 (1992) (affirming right of voters, candidate and supporters to include Harold Washington Party candidates' ballot access); *Anderson*, 460 U.S. 780 (affirming right of voters, candidate and supporters to include John B. Anderson's ballot access); *Socialist Workers Party*, 440 U.S. 173 (affirming voters right of voters, candidates, and supporters to inclusion of Socialist Workers Party and U.S. Labor Party ballot access); *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Penn. 1975), *aff'd*, 424 U.S. 959 (1976) (affirming right of voters, candidate and supporters to include U.S. Labor Party candidate's ballot access); *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (affirming right of voters, candidate and supporters to include independent candidate Eugene McCarthy's ballot access);

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (affirming right of voters, candidate and supporters to inclusion of Communist Party candidates' ballot access); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D. NY 1970), *aff'd*, 400 U.S. 806 (affirming right of voters, candidate and supporters to inclusion of Socialist Workers Party and Socialist Labor Party candidates' ballot access); *Amos v. Hadnott*, 394 U.S. 358 (1969) (affirming right of voters, candidate and supporters to inclusion of National Democratic Party of Alabama candidates' ballot access); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (affirming right of voters, candidate and supporters to inclusion of independent un-pledged antiwar presidential electors' ballot access); *Williams v. Rhodes*, 393 U.S. 23 (1968) (affirming right of voters, candidate and supporters to inclusion of American Independent Party candidate's ballot access).

This Court expressly found that seventy-five days should give the Secretary of State adequate time to prepare and print the general election ballot. *Anderson*, 460 U.S. at 800 ("Seventy-five days appears to be a reasonable time for processing the documents submitted by the candidates in preparing the ballot."). Arizona used to do exactly that until 1993, by a deadline in either September or October, and that from the territorial days. The earliness of the deadline – 146 days prior to the election – is both severe and discriminatory.

Cases from federal courts across the country both predating and postdating *Anderson* repeatedly concurred: the interest of the voters in a later deadline for choosing who they want on the ballot trumps the state's interest in keeping those voter

choices off the ballot. *See Nader 2000 Primary Comm., Inc. v. Hazeltine*, 110 F. Supp. 2d 1201, 1208 (D.S.D. 2000) (striking down as unconstitutional, under *Anderson*, an even later deadline than the deadline in Arizona); *McCarthy v. Hardy*, 420 F. Supp. 410 (E.D. La. 1976) (ordering state to put McCarthy on the ballot because right to have choice of candidates matters more than state's interest in imposing limits on ballot); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976) (striking down August 12 deadline for independent candidates because it predated state primary by one month and conventions by two months and treated voters different according to their partisan preferences); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976) (deadline too early when it predated the state primary and party conventions); *Fulani v. Lau,* Case No. cv-92-535 (Dist. Ariz. 1992) (June deadline too early).

Most states have August or later deadlines, far less signature requirements for petitions, and no residency ban on petition circulators; in our electoral history, that has been the norm for the entire country for most of our electoral history. *See* Winger, *supra*; *see also* Part II, *supra*. Eighteen states impose *de minimis* signature requirements, the increasing trend. *Id.* at 196. The primary fixes the true deadline the state needs for printing ballots since the scope of the ballot is undetermined until then. The state acknowledges the far greater number of primary candidate petitions merely require a deadline of ninety days before the primary election; hence, it had no explanation for why independent candidates required 146 days in 2004 and 153 days in 2008. Their post-hoc, excuse-making for these laws was incredulous to the Ninth Circuit

because the facts simply refuted Arizona's claims. *Nader v. Brewer*, 531 F.3d at 1033.

Brewers' petition misstates critical facts found by the Ninth Circuit. Brewer claims there was no "showing of any burden" that the early filing deadline violated Nader and Daien's First Amendment rights. (Petition, p. 25.) As the Ninth Circuit held, the evidence was that since these new deadlines were instituted, no independent candidate for president ever made the presidential ballot in Arizona. *Nader*, 531 F.3d at 1033.

Arizona imposes a higher signature requirement on independent candidates than anyone else, including statewide partisan presidential candidates, partisan senatorial candidates, partisan gubernatorial candidates, and even partisan candidates for Brewers' office, the Secretary of State. The requirement is not only higher than these other offices; it is anywhere from two times to twenty times higher. The requirement is also higher than most states of the Union for presidential ballot access, with several states successfully employing zero or nominal signature requirements. *See* Winger, *supra*, at 196. Such disparities within a state, especially when they fall disproportionately on insular unrepresented minorities, like independents unaligned to either party, discriminate and cannot be sufficiently tailored to meet any state interest. *See Green Party v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006) (holding that a state cannot impose higher signature requirements to avoid ballot confusion for one group of candidates than another group of candidates seeking access to statewide ballots).

Giving more favorable terms to a minor or major party than an independent candidate in measuring the seriousness of a candidate effectively presumes an independent candidate is iess serious merely according to his status as an independent; as such, such laws cannot pass constitutional scrutiny. *See Baird v. Davoren*, 346 F. Supp. 515 (D. Mass. 1972); *see also Whig Party of Alabama v. Siegelman*, 500 F. Supp. 1195 (N.D. Ala. 1980).

When a law burdens those unprotected by the traditional legislative processes, then judicial scrutiny is particularly apt. "In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny." *Anderson*, 460 U.S. at 793, n.16 (emphasis added). This alone – the discriminatory treatment of non-partisan candidates – requires strict scrutiny of these laws. *See Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980) (having a different deadline for independents than other candidates renders early deadline unconstitutional).

The deadline is also a severe burden because it predates the conventions by months, during the "dead" period of presidential politics, when, as the court noted in *Anderson*, volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters less interest and less certain of what options they want on the ballot. *See Anderson*, 460 U.S. at 792. The discrepancy between voter desires and voter outcomes was manifest here, where 200,000 Arizonans voiced their intention to vote for Nader in May, *see* Behavior

Research Center of Arizona, *Rocky Mountain Poll*, Released in May of 2004, but the circulator and petition restrictions precluded their voices from being heard in November choices.

To illustrate the contrast, under Arizona's contemporary law, the Republican Party of 1854 decided "too late" to be on the ballot by current standards, although this was not a presidential election year, (July 6, 1854, in response to new laws passed by Congress, the Kansas-Nebraska Act of 1854), *see* William E. Geinapp, *The Origins of the Republican Party*, 104-06 (1987); the Populist Party of 1892, one of the most influential independent political movements in America, decided "too late" (July 5, 1892) to be on the ballot (created in reaction to the Democratic candidate issue choices of 1892), *see* Robert B. Mitchell, *Egad! He Moved His Feet When He Ran: James Weaver, the First to 'Run' in a Presidential Race*, Washington Post, July 5, 2008, p. C01; Teddy Roosevelt, a favorite of Arizona voters, and his Bull Moose Party, decided "too late" to be on the ballot by current standards (June 22, 1912), *see* Patricia O'Toole, *The War of 1912*, Time, June 25, 2006; and Fighting Bob LaFollette, one of the most important alternative Presidential candidates in the 20th century, decided "too late" (July 4, 1924), *see* Charles Lincoln Van Doren and Robert McHenry, *Webster's Guide to American History*, 419 (1971). Those four are four of the most well known outsider Presidential candidates or third party movements in American history.

The state then argues for a "candidate diligence" test (re: candidate wealth); this court has never so limited the right of voters to inclusive ballots on the

timing of a candidate's petition drive. In *Rhodes*, Wallace supporters failed to submit petitions until July, after Arizona's deadline. *See Rhodes*, 393 U.S. at 66, n.7 (Warren, J., *dissenting*). In *Anderson*, Anderson, the candidate, did not submit petitions until April 24, 1980, when it was long well-known Reagan would be the GOP nominee. *Anderson*, 460 U.S. at 782. In neither case did this Court superimpose a "could have" test disguised as "reasonable diligence" as the district court suggested. (Petition, Appendix, p. 6b.)

District courts, following this Court, repeatedly strike down pre-primary deadlines for general election candidates that are twice as long as this court considered permissible in *Anderson*. Indeed, as the Ninth Circuit concluded, this particular deadline did not even meet rational basis review, given the state's only excuse for the law (finding paper for the ballot) was not even "internally consistent." *Nader*, 531 F.3d at 1039. Indeed, Arizona, which employed a September deadline for independent Presidential candidates for a hundred years from 1892 to 1992, never had any problem with finding printing paper for the ballot previously. It was only after such independent candidates won record votes in Arizona in 1992, that the deadline was moved up to early June, which foreclosed independents from the Presidential ballot for the next 12 years.

The excuse proffered by the state and accepted by the district court was that Presidential politics in 2004 had "changed since *Anderson*," noting that most candidates of the major parties were known by March. (Petition, Appendix, p. 12b.) This was error. The New York Times published an article on March 20, 1980

which read in the first paragraph: "President Carter and Ronald Reagan established themselves Tuesday as the likely contenders in next fall's election." Hedrick Smith, *President and Regan Now Appear Likely Contenders in Fall Elections*, New York Times, p. A1 (March 20, 1980). In other words, nothing's changed. Anderson's candidacy was likely a reaction to Reagan's nomination, so it is error to suggest that Anderson or his supporters did not know until later than March who the Republican nominee would be.

As this Court in *Anderson* well understood, the voting marketplace – through which the public introduces ideas and debates policies only according to the candidate choices the states afford them – is what the First Amendment protects: "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, [ballot access] restrictions threaten to reduce diversity and competition in the **marketplace of ideas.**" *Anderson*, 460 U. S. at 794 (emphasis added).

Ballot deadlines are not a calendar contest; the issue is fact-contingent and state-specific in light of the "whole" of the laws and their effect on similarly situated candidates and voter choice. Court after court has found that extended pre-primary deadlines for a general election ballot are inherently suspect and has struck them down – the relevant factor being the extended pre-primary deadline, not the specific date at issue. Nor has this court ever suggested that the reasonableness of a ballot-access deadline be determined by when the major-party candidates nominations become settled; indeed, Anderson did not announce until after he knew both Reagan and Carter

were the nominees. Consequently, the district court's assertion that because the partisan presidential primaries have moved several months earlier means an early independent candidate deadline is also warranted is erroneous.

Equally, laws which impose durational requirements on the right to participate in the political process have been struck down. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.") The effect of Arizona's petitioning requirement is that only those registered to vote in June can place a candidate on the ballot, even if they will eligible to vote in November for the same ballot. It is discriminatory since partisan candidates have deadlines between forty days (for partisan presidential primaries) and ninety days (for partisan non-presidential primaries).

Equally, the disparity between Arizona and other states equally weighs against Arizona. A court should also examine how sister states impose burdens to assess severity of restrictions and necessity of restrictions to protect the public. *See Rockefeller v. Powers*, 917 F. Supp. 155, 161 (E.D.N.Y. 1996). Here, again, the comparison exposes the severity of these burdens, as so few states employ such high signature requirements, almost none impose early June deadlines or even July deadlines, and only a minority impose residency bans on circulator speech.

The Supreme Court of Arizona only found the deadline permissible when a party switcher tried to

use the ballot access as way of circumventing internal state party convention recognition, and, therefore, did not apply strict scrutiny. *See Browne v. Bayless*, 202 Ariz. 405, 408-09, 406 P.3d 416, 419-20 (2002). The speech restricted, the number of speakers excluded, and the size of the audience available and likely to hear the speech, are the focus. As the Ninth Circuit noted, the state did not even present an "internally consistent position" and provided "no satisfactory explanation" for the early deadline. *Nader*, 531 F.3d at 1039-40. The state, which does not know until September the number of candidates and initiatives for four hundred different offices, cannot claim the mere presence of an independent candidate is the determinative factor in ordering ballot paper, especially when it never had any problem with "missing ballot paper" for a hundred years of prior presidential election history, most of which included the early voting, Spanish translation, and other requirements of ballots.

Alabama must abide by the same federal laws; its deadline is September 6. Alaska must must abide by the same federal laws; its deadline is August 6. Arkansas must abide by the same federal laws; its deadline is August 4. California must abide by the same federal laws; its deadline is August 8. Connecticut must abide by the same federal laws; its deadline is August 6. The District of Columbia must abide by the same federal laws; its deadline is August 27. Hawaii must abide by the same federal laws; its deadline is September 5. Idaho must abide by the same federal laws; its deadline is August 24. Iowa must abide by the same federal laws; its deadline is August 15. Kansas must abide by the same federal laws; its deadline is August 4. Kentucky must abide

by the same federal laws; its deadline is September 5. Louisiana must abide by the same federal laws; its deadline is September 2. Maine must abide by the same federal laws; its deadline is August 15. Maryland must abide by the same federal laws; its deadline is August 4. Massachusetts must abide by the same federal laws; its deadline is August 26. Minnesota must abide by the same federal laws; its deadline is September 9. Mississippi must abide by the same federal laws; its deadline is September 5. Montana must abide by the same federal laws; its deadline is August 13. Nebraska must abide by the same federal laws; its deadline is September 1. New Hampshire must abide by the same federal laws; its deadline is August 3. New York must abide by the same federal laws; its deadline is August 19. North Dakota must abide by the same federal laws; its deadline is September 5. Ohio must abide by the same federal laws; its deadline is August 21. Oregon must abide by the same federal laws; its deadline is August 26. Pennsylvania must abide by the same federal laws; its deadline is August 1. Rhode Island must abide by the same federal laws; its deadline is September 5. South Dakota must abide by the same federal laws; its deadline is August 5. Tennessee must abide by the same federal laws; its deadline is August 21. Vermont must abide by the same federal laws; its deadline is September 12. Virginia must abide by the same federal laws; its deadline is August 22. Washington must abide by the same federal laws; its deadline is August 2. West Virginia must abide by the same federal laws; its deadline is August 1. Wisconsin must abide by the same federal laws; its deadline is September 2. Wyoming must abide by the same federal laws; its deadline is August 25. Only Texas with a May 8 deadline, Nevada with an April 11

deadline, and Utah with a March 17 deadline, are earlier than Arizona. One state, New Mexico, has an identical deadline. Forty-five states have later deadlines, most employing much later deadlines, as Arizona itself utilized during the civil rights balloting era from 1972 through 1992. The median deadline is August 6, two months later than Arizona. *See* Fed. Election Comm., *2008 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access*, August 14, 2008.[1]

There is simply no reason why Arizona would require independent candidates to submit ballot-access petitions over two months prior than most other states. As the decision below noted, Arizona's unusual June deadline, a-historical and contrary to most states of the Union, months prior to the primary, could not even stand rational basis review, least of all strict scrutiny.

C. There Is No Uncertainty for Amici States Given Overwhelming Concurrence of Circuits and States Against These Laws.

Few of the amici states, already in the minority in imposing these laws, lack clarity from their respective circuits. The Ninth Circuit has already rendered any non-resident ban on petition circulation invalid in amici states Montana, Alaska, and Idaho, *see Nader v. Brewer*, 531 F.3d 1028; the Tenth Circuit has already invalidated any non-resident ban on petition circulation in amici states Colorado, Oklahoma, Kansas and Wyoming, *see Yes on Term Limits*, 550

---

[1] *See* http://www.fec.gov/pubrec/2008pdates.pdf.

F.3d 1023; *see also Chandler*, 292 F.3d 1236; and the Sixth Circuit has already invalidated any non-resident ban on petition circulation in amici states Michigan and Ohio, *see Nader v. Blackwell*, 545 F.3d 459. Amici states Alabama, Florida, and Delaware never faced any uncertainty concerning the constitutionality of a residency ban on presidential petition circulators since these states have no residency ban on petition circulators.

The same applies to the purported lack of clarity on the constitutionality of imposing an extended pre-primary deadline on general election independent candidates for inclusion on the ballot with high signature requirements and extensive petitioning procedures, when the state, in Arizona's case, cannot even provide an "internally consistent" explanation for its laws. *Nader*, 531 F.3d at 1039. Alabama, Alaska, Idaho, New Hampshire, Ohio, South Dakota, and Wyoming all have deadlines after Arizona's.

CONCLUSION

Unless this court seeks to affirm the precedent below and the sister precedents that followed it in multiple Circuits, uniting the Sixth, Seventh, Ninth and Tenth Circuits on the impermissibly broad character of using non-residency as a proxy for fraud when states try to ban all non-residents from the core political speech of Presidential petition circulation in a national election directly impacting all Americans, then no necessary justification for accepting certiorari on that issue persists in this case. Indeed, very few states in the country impose residency bans on circulating petitions; the few that do have resolution in Circuits having already addressed the issue.

The same logic applies to Arizona's early deadline for submission of candidate petitions, a deadline the Ninth Circuit noted could not even pass rational basis review given Arizona's failure to articulate even an "internally consistent" excuse for its early deadline. This court, two decades ago, noted seventy-five days normally sufficed for a general election ballot access deadline for independent candidates for the Presidency and almost every state in the nation concurs. Arizona's current deadline, only imposed in 1993, is more than twice as long – 153 days. This Court, like circuit courts across the country and the overwhelming majority of states, reject deadlines earlier than August, particularly extended pre-primary deadlines.

Dated at Milwaukee, Wisconsin on this the 5th day of February, 2009.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Respondents

By: Robert G. Bernhoft
Wis. State Bar No. 1032777
Counsel of Record
Robert E. Barnes
Of Counsel

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com